82-517

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ALEXANDER L. STEVAS,
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No. _____

In the Supreme Court
OF THE
United States

October Term, 1981

VOLVO PENTA OF AMERICA
Petitioner

vs.

PATRICK H. KENNEDY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Counsel for Petitioner
Volvo Penta of America

MacGILLIVARY & JONES, P.S.
RANDALL L. STAMPER
STEPHEN C. HASKELL
ESTHER LARSEN HOLDEN
1450 SeaFirst Fin. Center
Spokane, Washington 99201

(509) 838-8601

Questions Presented.

1. Whether, within the limitations of the Due Process Clause of the Fourteenth Amendment, Volvo of America, was properly served with process by respondent serving, at four o'clock in the afternoon on the eve of July 4th, a summons and complaint upon a production line worker, who at no time had been authorized to represent, with regard to corporate matters, or to accept service of process on behalf of, Volvo of America or its Volvo Penta division, and whose work was limited to shipping, stocking and production line activities of a production and assembly plant, containing no corporate offices of either Volvo of America or its Volvo Penta division?

2. Whether the Supreme Court of the State of Washington, acted consistently with the Due Process Clause of the Fourteenth Amendment, in reviewing the Court of Appeal's reversal of the trial court's denial of petitioner's motion to vacate a default judgment entered in favor of respondent?

3. Whether the decision of the Supreme Court of the State of Washington, in determining that Mr. Machupa had been given express authority from Volvo of America to accept the summons and complaint, was so totally devoid of evidentiary support as to render the reinstatement of the default judgment unconstitutional under the Due Process Clause of the Fourteenth Amendment?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. _____

VOLVO PENTA OF AMERICA, Petitioner,

v.

PATRICK H. KENNEDY, Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

Petitioner Volvo Penta of America respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on June 24, 1982.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reproduced as Appendix "A" hereto. It was reported in

the Washington Reports with the following citation, Kennedy v. Sundown Speed Marine, Inc., 97 Wn.2d 544, 647 P.2d 30 (1982). The opinion of the Court of Appeals of the State of Washington is reproduced as Appendix "B" hereto. It was an unpublished opinion noted at 29 Wn. App. 1027 (1982).

JURISDICTION

The judgment of the Supreme Court of the State of Washington reinstating the default judgment of the Superior Court for Benton County was filed on June 24, 1982. On July 21, 1982, the Clerk of the Supreme Court of the State of Washington certified that on July 14, 1982, the court's opinion became the decision terminating its review of the case, and the cause was then mandated to the Superior Court for Benton County. This

petition for certiorari was filed within 90 days of the filing of the opinion by the Supreme Court for the State of Washington. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION

Fourteenth Amendment, United States Constitution (in relevant part):

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Volvo of America Corporation, improperly sued herein as Volvo Penta of America,[1] seeks to reverse the decision

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[1] Volvo Penta is a division of Volvo of America Corporation, which has no subsidiaries, but which is a wholly owned subsidiary of Volvo North America Corporation, which has two other wholly owned subsidiaries, Volvo Canada Limited and Volvo White Truck Corporation.

of the Supreme Court of the State of Washington which reinstated the default judgment of the Superior Court for Benton County entered in favor of Patrick H. Kennedy in the amount of twenty-eight thousand seven hundred and twenty-five dollars ($28,725.00), together with interest at the rate of 12% per annum. (CP 55)[2]

Volvo Penta of America, hereinafter referred to as "Volvo Penta," is a division of Volvo of America, hereinafter referred to as "Volvo," which is incorporated in the State of New Jersey, with its principal place of business in Rockleigh, New Jersey. Volvo also maintains a production plant for the assembly of

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[2]CP refers to Clerk's Papers prepared for the appeal to the Court of Appeals.

boat engines in Chesapeake, Virginia. However, there are no corporate offices which conduct business on behalf of Volvo located at the Chesapeake plant, nor are any officers of Volvo Penta employed at the plant. (CP 47-48)

Respondent Patrick H. Kennedy brought an action against Sundown Speed Marine, Inc., doing business as Sundown Marine; Hawaiian Boats, Inc.; and Volvo Penta of America, alleging that he had on September 16, 1978, purchased a 28-foot "speed boat" from Sundown Speed Marine, Inc., in Pasco, Washington, manufactured by Hawaiian Boats, Inc., and equipped with a Volvo Penta engine. Mr. Kennedy further alleged to have revoked his acceptance of the boat and rescinded his contract of purchase, claiming all named defendants were jointly guilty (sic) of

misrepresentation, negligence and fraud. (SP 20-21)[3]

On July 3, 1979, at 4:00 p.m., the Sheriff of Chesapeake County, Virginia, served Mr. Kennedy's summons and complaint upon Mr. Michael Machupa. Mr. Machupa was and is a materials supervisor employed on the production line at the Chesapeake assembly plant, without express authority to represent Volvo Penta or Volvo, and he has never represented Volvo Penta or Volvo in any action or proceeding. As established by Mr. Machupa's affidavit, his duties are strictly mechanical in nature, being confined to production line activities.

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[3]SP refers to Respondent's Supplement to Clerk's Papers prepared for the appeal to the Court of Appeals.

As further established in Mr. Machupa's affidavit, he did not realize the significance of the legal papers with which he had been served, but felt it appropriate they be "shipped" to Volvo's corporate headquarters. He therefore gave the papers to Joan Richards, a clerical employee, who claims to have mailed the summons and complaint to Volvo's corporate headquarters on July 4, 1979. Neither employee did anything further to insure the papers were received or responded to by Volvo after July 4, 1979. (CP 34-35, 47-48)

As shown by the affidavit of Paul E. Dixon, Assistant General Counsel for Volvo, the summons and complaint were never received by Volvo, and no authorized representative of Volvo or employee at its corporate headquarters was made

aware of the purported service of process or of the pendency of the action. (CP 47-48)

On September 6, 1979, the Benton County Superior Court entered its Findings of Fact and Conclusions of Law. The court found that Mr. Kennedy had advanced the sum of fifteen thousand eight hundred dollars ($15,800.00) for the purchase of his speed boat; the court further found that it was possessed of jurisdiction to enter a judgment against Volvo Penta in the sum of twenty-eight thousand seven hundred and twenty-five dollars ($28,725.00), together with the interest at the rate of 12% per annum. A judgment in this amount was entered on September 6, 1979. (CP 56-58, 55)

Following entry of this default judgment, Mr. Kennedy's counsel forwarded a

copy of said judgment to Volvo Penta with a demand for payment. This was the first time either Volvo Penta or Volvo became aware of the litigation. (CP 47-48) Thereafter, counsel was retained to represent Volvo.

On October 17, 1979, Volvo submitted a motion to vacate the default judgment pursuant to Superior Court Civil Rules 60(b)(1) and 60(b)(5) of the Washington Court Rules. At this same time, Volvo submitted a motion and order to show cause supported by counsel's affidavit, requiring Mr. Kennedy to appear and show cause why the default judgment should not be vacated based upon failure to obtain jurisdiction over Volvo and upon mistake, inadvertence or excusable neglect on Volvo's part. (CP 49-53, 54-55)

On November 17, 1979, Volvo's motion to vacate the default judgment was heard before the Honorable Albert J. Yencopal in the Superior Court of Benton County. At the time of the hearing counsel for Mr. Kennedy produced, for the first time, an affidavit which he had signed and which had attached to it a letter, addressed to counsel for Mr. Kennedy from Deputy Sheriff James W. Dunlo, who served the summons and complaint on Mr. Machupa. Deputy Sheriff Dunlo claimed in the letter that Mr. Machupa had received authority from the "Volvo Plant in New Jersey" to "accept the papers being served" after placing a long-distance phone call.[4] (CP 5, Verbatim Report of Proceedings, 5-15)

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[4]The letter is reproduced in the opinion of the Supreme Court of the State of Washington which is Appendix "A" hereto.

Counsel for Volvo objected to the letter as being inadmissible evidence. The trial court then proceeded to deny the motion to vacate the default judgment without requiring any foundation to be laid concerning the letter from Deputy Sheriff Dunlo and despite the fact that the affidavit from Volvo's assistant general counsel was contrary to the letter from Deputy Sheriff Dunlo. (Verbatim Report of Proceedings, 5-15)

Volvo appealed the denial of its motion to vacate to the Court of Appeals of the State of Washington. In an unpublished opinion, the Court of Appeals on June 18, 1982, unanimously reversed the default judgment. (See Appendix "B")

The Court of Appeals based its decision on Superior Court Civil Rule 60(b)

(5) which allows vacation of a void judgment. It determined that the service of process on Volvo was violative of RCW 4.28.080(10), which deals with service of process upon foreign corporations doing business within the State of Washington. This statute provides in pertinent part:

> The summons shall be served by delivering a copy thereof, as follows:
>
> . . .
>
> (10) If suit be against a foreign corporation . . . to any agent, cashier or secretary thereof.

Because Mr. Machupa lacked the requisite authority to be served with process for Volvo, the service was not valid. Therefore, the trial court had no jurisdiction over Volvo, and as a result, the default judgment was void. (Appendix "B")

Mr. Kennedy then sought review by the Supreme Court of the State of Washington,

which on June 24, 1982, reversed the Court of Appeals and reinstated the default judgment, holding that the trial court had not abused its discretion in refusing to vacate the judgment. The court referred to the letter from Deputy Sheriff Dunlo and noted that the trial court could have concluded that Mr. Machupa had been given authorization by Volvo to receive service. (Appendix "A")

REASONS FOR GRANTING REVIEW

I.

A JUDGMENT ENTERED WITHOUT PERSONAL JURISDICTION OVER THE DEFENDANT IS VOID. ON MOTION TO VACATE A DEFAULT JUDGMENT FOR LACK OF PERSONAL JURISDICTION, THE COURTS OF THE STATE OF WASHINGTON ARE MISAPPLYING THE PRINCIPLES OF PERSONAL JURISDICTION AND DUE PROCESS OF LAW.

The term "due process of law" as it is applied to a judicial proceeding means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent to pass upon the subject matter of the suit; and, if that involves a determination of the personal

liability of a defendant, he must be brought within the jurisdiction of that tribunal. Pennoyer v. Neff, 95 U.S. 714, 733, 24 L.Ed 565 (1877).

Modern jurisprudence regarding the power of a state to exercise personal jurisdiction over persons not found within the state dates back to International Shoe v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S. Ct. 154 (1945).

The Superior Court's lack of personal jurisdiction over a defendant renders void its default judgment against that defendant. Thos. P. Gonzales Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1255 (9th Cir. 1980); Veeck v. Commodity Enterprises, Inc., 487 F.2d 423, 426 (9th Cir. 1973).[5]

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[5]As determined by the Court of Appeals, personal service upon Volvo was inade-

Notwithstanding the foregoing principles of law, the Supreme Court of the State of Washington, as shown by its decision in this case, allows a judgment to be entered against a defendant, despite its lack of personal jurisdiction over that defendant. This is contrary to law because it requires less than the process which is due under our system of jurisprudence. Accordingly, this Court should grant certiorari to assure the protection and enforcement of individual rights.

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quate because Mr. Machupa, upon whom service was rendered, was not shown to be an "agent" of Volvo. Therefore, the Superior Court lacked jurisdiction over Volvo.

II.

DEFENDANTS WILL CONTINUE, AS IN THIS CASE, TO BE DEPRIVED OF DUE PROCESS OF LAW UNLESS THERE IS A UNIFORM APPLICATION OF THE PROCEDURAL RULES IN CASES INVOLVING MOTIONS TO VACATE WHERE A JUDGMENT IS VOID.

A reviewing court has a "nondiscretionary duty" to grant relief from a default judgment in cases where there has been a proper request, pursuant to Superior Court Civil Rule 60(b)(5) of the Washington Court Rules, to be relieved of a default judgment on the ground that the judgment was void for lack of personal jurisdiction. Thos. P. Gonzales Corp. v. Consejo Nacional de Produccion de Costa Rica, supra, 614 F.2d 1247,

1256.[6]

A motion under Superior Court Civil Rule 60(b)(5) is treated differently than motions under other subsections of Rule 60(b).[7] As pointed out by the commentators on the Federal Rules of Civil Procedures,

> Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). There is no question of discretion on the part of the

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[6]Washington courts have implicitly recognized a "nondiscretionary duty" to grant relief from a default judgment based on lack of personal jurisdiction. King County v. Rea, 21 Wn.2d 593, 152 P.2d 310 (1944) (vacating lower court decree without referring to abuse of discretion); Metropolitan Fed. Sav. & Loan Ass'n v. Greenacres Memorial Ass'n, 7 Wn. App. 695, 502 P.2d 476 (1972) (the distinction between void and voidable judgments was recognized).

[7]CR 60(b)(5) is identical to its federal counterpart FRCP 60(b)(4) and provides, "On motion and upon such terms as are just, the court may relieve a party or his legal representative from

> court when a motion is under Rule 60(b)(4). Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense. Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.

11 C. Wright & A. Miller, Federal Practice § 2862, at 197 (1973).

There is no justification for the denial by the Washington State courts of petitioner's right to due process. This Court should, therefore, grant certiorari to assure that the Washington State courts act consistently with the requirements of the Due Process Clause.

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a final judgment, order or proceeding for the following reasons: . . . (5) The judgment is void."

III.

A DECISION WHICH IS TOTALLY DEVOID OF EVIDENTIARY SUPPORT RENDERS A JUDGMENT BASED ON THAT DECISION UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE.

This Court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied. Mobil Oil Corp. v. F.P.C., 417 U.S. 283, 310, 41 L.Ed.2d 72, 94 S.Ct. 2328 (1974); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 491, 95 L.Ed. 456, 71 S.Ct. 456 (1950).

This Court has granted certiorari to review matters of evidence in cases where the decision below appears to be shockingly wrong and, thus, presents substantial due process questions. Garner v. Louisiana, 368 U.S. 157, 7

L.Ed.2d 207, 82 S.Ct. 248 (1961); Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960).[8]

Use of inadmissible evidence to support reinstatement of a default judgment deprives litigants of their right to due process. Review by writ should be granted.

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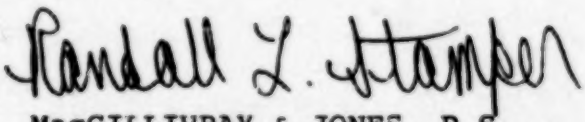
[8]The only evidence which could support a finding of representative capacity on the part of Mr. Machupa was the unverified letter from Deputy Sheriff Dunlo, which was objected to as inadmissible when it was presented to the court. Because the letter was inadmissible and because the affidavits of Mr. Dixon and Mr. Machupa establish that Mr. Machupa did not have authority to accept service of process, the decision of the Supreme Court of the State of Washington was totally unsupported by evidence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Washington.

Respectfully submitted,



MacGILLIVRAY & JONES, P.S.
RANDALL L. STAMPER
STEPHEN C. HASKELL
ESTHER LARSEN HOLDEN

Counsel for Petitioner,
Volvo Penta of America

APPENDIX A.

Opinion.

PATRICK H. KENNEDY, Petitioner, v. SUNDOWN SPEED MARINE, INC., ET AL, Defendants, VOLVO PENTA OF AMERICA, Respondent.

[No. 47980-1. En Banc. June 24, 1982.]

DOLLIVER, J.--Plaintiff purchased a 28-foot boat from defendant Sundown Speed Marine, Inc. The manufacturer of the boat was defendant Hawaiian Boats, Inc. of California. The engine was manufactured by defendant Volvo Penta of America, a division of Volvo of America. After taking possession, plaintiff claimed the boat, including the engine, was defective. He revoked acceptance and demanded return of all moneys expended. An action for breach of warranty was commenced in June 1979.

On July 3, 1979, the summons and complaint were served by a deputy sheriff

of Chesapeake, Virginia on a production worker at the Volvo Penta plant in Chesapeake. The corporate headquarters of Volvo of America are in Rockleigh, New Jersey. Volvo claims it never received the papers. Subsequently, a default judgment was entered against Volvo and payment was requested. Volvo, contending it was unaware of the action, moved under CR 60 to vacate the judgment. The motion was denied. The Court of Appeals, in an unpublished opinion, reversed. We now reverse the Court of Appeals and uphold the denial of the motion to vacate.

The requirements for effective service on a foreign corporation are contained in RCW 4.28.080:

> The summons shall be served by delivering a copy thereof, as follows:
>
> . . . .

> (10) If the suit be against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof.

[1] In Crose v. Volkswagenwerk Aktiengesellschaft, 88 Wn.2d 50, 58, 558 P.2d 764 (1977), we stated:

> [Service] must be made on an authorized agent of the corporation who is truly and thoroughly a representative of it, rather than a mere servant or employee, or a person whose authority and duties are limited to a particular transaction. The agent must be an agent in fact, not merely by construction of law, and must be one having in fact representative capacity and derivative authority.

The law is clear. The question is whether the person upon whom the papers were served was an agent in fact. Volvo does not deny service could have been made at the Chesapeake plant; it denies only that service was made on a person authorized to receive it.

At the hearing on the motion to vacate, the following documents were before the court:

1. An affidavit from the person upon whom the papers were served, Michael Machupa, Jr.:

> At all times material to this matter, I have been employed for Volvo Penta Production, a division of Volvo of America Corporation, in Chesapeake, Virginia. My work with Volvo in July 1979 includes the following with respect to production; shipping of products, stocking of products and feeding the production line when appropriate.
>
> At no time have I been given any authority to represent Volvo Penta in any way other than to perform my daily tasks described above.
>
> On or about July 3, 1979, I recall being given certain papers by the Chesapeake, Virginia, Sheriff's office. I was not told what these papers were and did not realize the significance of these papers other than that they consisted of a legal summons and complaint. I had never been given any such documents before on behalf of Volvo, but thought

that they should be shipped to our main office, and so gave them to Mrs. Joan Richards, who sent the material to R. Dowden at Volvo headquarters on July 4, 1979. I have been informed that the papers never reached their destination. Further, after the 4th of July holiday I did nothing to insure that the papers were sent to our main office.

2. An affidavit from Paul E. Dixon:

My position with Volvo is that of Assistant General Counsel for the Volvo of America Corporation. Volvo Penta is a division of Volvo of America and Volvo Penta has its principal place of business at Rockleigh, New Jersey. The Volvo Penta plant at Chesapeake, Virginia, is a production plant whose operations are confined to the production and assembly of engines. There are no corporate offices in Chesapeake, Virginia, which conduct any business on behalf of Volvo other than that business directly relating to the operation of the plant, and there are no corporate officers of Volvo Penta or Volvo of America headquartered at the Chesapeake, Virginia, plant.

As evidenced by the affidavit of Michael Machupa, Mr. Machupa was

in July, 1979, employed as a machine supervisor in Volvo's Chesapeake, Virginia, production plant, and his duties were strictly those set forth in his affidavit and strictly limited to rendition of his daily tasks.

At no time has Mr. Machupa been authorized to represent Volvo of America or its Volvo Penta division with regard to any corporate matters, nor has he ever been an officer of Volvo of America or any of its divisions or affiliates, and Mr. Machupa has never been authorized to accept service of process on behalf of Volvo.

As set forth in the affidavit of Mr. Machupa, the summons and complaint in this action were set aside and misplaced by him and at no time prior to the entry of the default judgment was any authorized representative of Volvo Penta aware of the purported service of process or the pendency of this action.

3. A letter to the attorney for plaintiff from Deputy Sheriff James W. Dunlo who served the summons and complaint:

This letter is in reference to your letter dated October 25, 1979.

> The summons and complaint from the Benton County Superior Court on Volvo Penta of America was served on Mr. Michael Machupa because Mr. Machupa was in charge of his division and was of the highest authority at the address given, Volvo Penta of America Industrial Avenue, Chesapeake.
>
> Before he was served, Mr. Machupa made a long distance phone call to the Volvo Plant in New Jersey and he was told to accept the papers being served.
>
> If you have any further questions, please feel free to contact me.

In connection with the letter from Dunlo, counsel for plaintiff advised the court, "If you honor would like an affidavit from the sheriff that says the same thing, I will put that in an affidavit and mail it back and have Mr. Dunlo who served these papers sign the affidavit."

CR 60(b), which addresses relief from a judgment or order provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (5) The judgment is void;

If the court had no jurisdiction over Volvo because of a violation of RCW 4.28.080(10), the judgment is void.

[2] Although in the view of the Court of Appeals, Mr. Machupa lacked the requisite authority to be served with process for Volvo Penta, the real question for an appellate court is whether the trial court acted properly in denying the motion to vacate the judgment. A motion to vacate a judgment under CR 60(b) is to be decided by the trial court in the exercise of its judgment and that decision will be overturned on

appeal only when it plainly appears the court has abused its discretion. Haller v. Wallis, 89 Wn.2d 539, 573 P.2d 1302 (1978). From all that was before it, the trial court could have concluded that on this particular occasion Mr. Machupa in fact had been given authorization by Volvo Penta to receive service. While we, as did the Court of Appeals, might have reached a different conclusion, after examining the entire record we find the trial court in refusing to vacate the judgment did not abuse its discretion.

Reversed.

ROSELLINI and DORE, JJ., concur.

DIMMICK, J. (concurring in the result) --I concur in the result only, and not with the reasoning of the majority. I also agree with the dissent that the issue is whether the judgment is void for

lack of personal jurisdiction.

I would affirm the trial court's determination that proper service was effectuated upon Mr. Machupa. At the time the trial court entered the default judgment against Volvo Penta it had apparent jurisdiction pursuant to the sheriff's return of service. However, Volvo subsequently challenged Mr. Machupa's authority to accept service on its behalf. At the time of hearing, the trial court had before it two affidavits asserting that Mr. Machupa was not authorized by the corporation. On the other hand, the plaintiff presented a letter from James Dunlo, the deputy sheriff who served the process, on the official letterhead of the sheriff in Chesapeake, Virginia. The letter unequivocally stated that Mr. Machupa had express authority from the

corporation to accept the summons and complaint. Plaintiff's counsel told the court that he could get an affidavit stating the same thing if required to do so. The trial court accepted the letter rather than delaying the matter by waiting for a formal affidavit containing the same information. I will not substitute my judgment for that of the trial judge as to the wisdom of accepting that letter rather than a formal affidavit. He obviously concluded that the letter was reliable evidence and chose to accord it great weight.

Upon review of the entire record before the trial court and the applicable law, I agree with the trial court that Mr. Machupa was a specially authorized agent of Volvo Penta expressly for the acceptance of this summons and complaint.

Thus, I would reverse the Court of Appeals, which totally ignored the letter, and affirm the trial court.

WILLIAMS and DORE, JJ., concur with DIMMICK, J.

UTTER, J. (dissenting)--The majority commits a fundamental error by reviewing the trial court's denial of Volvo's motion to vacate the default judgment in terms of whether or not such denial was an abuse of discretion. The majority is quite right in asserting that generally motions under CR 60(b) are left to the trial court's sound discretion. Haller v. Wallis, 89 Wn.2d 539, 573 P.2d 1302 (1978); Altman v. Connally, 456 F.2d 1114 (2d Cir. 1972). As to most of the many different grounds for vacating judgment, the trial court's decision should not be overturned without a show-

ing of abuse of discretion. A motion that the judgment is void under CR 60(b)(5) is an exception to this rule of discretion, however. As the preeminent commentators on the Federal Rules of Civil Procedure have said about FRCP 60(b)(4) (the identical counterpart to our CR 60(b)(5)):

> Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). There is no question of discretion on the part of the court when a motion is under Rule 60(b)(4). Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense. Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.

11 C. Wright & A. Miller, Federal Practice § 2862, at 197 (1973). See Jordon v. Gilligan, 500 F.2d 701 (6th Cir 1974),

cert. denied, 421 U.S. 991, 44 L. Ed.2d 481, 95 S. Ct. 1996 (1975); Hicklin v. Edwards, 226 F.2d 410 (8th Cir. 1955); Shannon v. Norman Block, Inc., 106 R.I. 124, 256 A.2d 214 (1969).

In a situation identical to the one presented here, the Ninth Circuit vacated a default judgment for lack of personal jurisdiction, stating it had a "nondiscretionary duty" to grant relief from the judgment. Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1256 (9th Cir. 1980). While our own cases have not explicitly recognized such a nondiscretionary duty, Washington cases involving motions to vacate because the judgment is void under CR 60(b)(5) implicitly recognize such a duty by failing to review the trial court's decision in terms of

abuse of discretion. King Cy. v. Rea, 21 Wn.2d 593, 152 P.2d 310 (1944) (vacating lower court decree without reference to abuse of discretion); Metropolitan Fed. Sav. & Loan Ass'n v. Greenacres Mem. Ass'n, 7 Wn. App. 695, 502 P.2d 476 (1972) (recognizing the distinction between void and voidable judgments). The question before us is not whether the trial court abused its discretion, but whether the judgment is void for lack of personal jurisdiction over Volvo.

Turning to the merits of Volvo's motion, I would hold the Court of Appeals correctly found personal service upon Volvo was inadequate since Mr. Machupa, upon whom service had been rendered, was not shown to be an "agent" of the corporation. See Crose v. Volkswagenwerk Aktiengesellschaft, 88 Wn.2d 50, 558

P.2d 764 (1977); State ex rel. Western Can. Greyhound Lines, Ltd. v. Superior Court, 26 Wn.2d 740, 175 P.2d 640 (1946); Faucher v. Burlington N., Inc., 24 Wn. App. 711, 603 P.2d 844 (1979). The majority itself betrays allegiance to the Court of Appeals holding in its conjecture that it "might have reached a different conclusion" than the trial court had it addressed the merits of Volvo's claim. Majority opinion, at 548. We need not pose the question in the hypothetical; it is our responsibility to reach the question. Reviewing the law and the facts, I would hold the trial court did not have personal jurisdiction to issue its decree.

That Volvo seeks vacation of a default judgment further compels us to vacate the judgment against Volvo. The court in

Schwab v. Bullock's Inc., 508 F.2d 353 (9th Cir. 1974) identified three policy concerns governing disposition of a motion to vacate a default judgment:

> First, Rule 60(b) is remedial in nature and therefore must be liberally applied (e. g., Butner v. Neustadter (9th Cir. 1963) 324 F.2d 783, 786; 7 J. Moore, Fed. Prac., ¶ 60.10[7], [9]; ¶ 60.18[8]. Second, default judgments are generally disfavored; whenever it is reasonably possible, cases should be decided on their merits (e. g., Pata-poff v. Vollstedt's Inc. (9th Cir. 1959) 267 F.2d 863, 865; 6 J. Moore, Fed. Prac., ¶ 55.10[1]. Third, and as a consequence of the first two considerations, "[w]here timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits" (7 J. Moore, Fed. Prac., ¶60.19, at 232-33; Butner v. Neustadter, supra, 324 F.2d at 786).

508 F.2d at 355. At this stage in the proceedings, Volvo does not even know if it made the engine for the boat which

is the subject matter of Kennedy's contract claim. This case should be tried on the merits. I would affirm the unanimous Court of Appeals.

BRACHTENBACH, C.J., and STAFFORD and PEARSON, JJ., concur with UTTER, J.

APPENDIX B.

Opinion.

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

PATRICK H. KENNEDY, Respondent, v. SUNDOWN SPEED MARINE, INC., d/b/a SUNDOWN MARINE; HAWAIIAN BOATS, INC., Defendants. VOLVO PENTA OF AMERICA, Appellant.	)	No. 3746-III-1 Division Three Panel Two FILED JUN 18 1981

ROE, A.C.J.--On September 16, 1978, Patrick Kennedy purchased a 28-foot speed boat at a cost of approximately $15,800. The retailer was defendant Sundown Speed Marine, Inc., doing business as Sundown Marine; the manufacturer was defendant Hawaiian Boats, Inc. of California; and the manufacturer of the engine was the

defendant/appellant Volvo Penta of America, a division of Volvo of America. The purchase was made through the retailer. Volvo of America's headquarters are in Rockleigh, N. J., with its Volvo Penta plant in Chesapeake, Virginia. After taking possession of this boat in March 1979, Kennedy claimed the boat was defective, including serious engine problems. Kennedy revoked acceptance in May of 1979 and demanded return of all monies expended. An action for breach of warranty under the Uniform Commercial Code and the Magnuson-Moss Act[1] was filed in June of 1979. On July 3, 1979, late in the afternoon before the Independence Day holiday, the summons and complaint were given to a Volvo line supervisor at

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[1] Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1976).

the Virginia plant.[2] These papers were allegedly mailed to Volvo headquarters the following day. Volvo claimed these papers were never received. On September 6, 1979, a default judgment was entered against Volvo in the amount of $28,725 plus interest.[3] Payment was

---

[2]The line supervisor was a union man who, at the time of service, was the highest ranking employee at the plant. The higher ranking management personnel were not at the plant at 4 p.m. on this day.

[3]A breakdown of the judgment appeared in the findings of fact and conclusions of law as follows:

"Interest at 12% on $1,000 from 9/25/78 to 9/6/79	120.00
Interest at 12% on $12,000 from 11/28/78 to 9/6/79	1,240.00
Interest at 12% on $2,800 from 4/9/79 to 9/6/79	140.00
. . .	
Boat Insurance	343.00
Boat bumpers and accessories	26.00
Gas stolen from boat while at Sundown Marine	56.00

requested from Volvo. Volvo contended it was unaware of the pendency of any action and moved to vacate the default judgment. This motion was denied. From this denial Volvo appeals. We reverse.

The facts indicate that service of process on the line supervisor at the Volvo plant does not comply with RCW 4.28.080(10). RCW 4.28.080 reads in pertinent part:

> The summons shall be served by delivering a copy thereof, as follows:

Boathouse moorage - 3/16/79 to 9/6/79	360.00
Monies advanced for payment of boat	15,800.00
Attorneys' fees	3,500.00
Other Damages	
Increase of replacement cost of boat of comparable value from 9/30/78	2,640.00
Value of time and effort to have boat repaired and obtain delivery of all agreed items in contract and general damages	4,500.00
	$28,725.00"

. . .

> (10) If the suit be against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof.

The question of valid service turns on the capacity and character of the agent of the corporation served. In absence of express authority given by the corporation, a review of the surrounding facts may be made and the inference which may be properly drawn therefrom considered. State ex rel. Western Canadian Greyhound Lines, Ltd. v. Superior Court, 26 Wn.2d 740, 175 P.2d 640 (1946); Crose v. Volkswagenwerk Aktiengesellschaft, 88 Wn.2d 50, 558 P.2d 764 (1977).

Service of process may not be made upon an employee who has neither express nor implied authority to represent the corporation, nor an employee whose duties

are purely mechanical. Faucher v. Burlington Northern, Inc., 24 Wn. App. 711, 603 P.2d 844 (1979). Service of process upon an agent of a foreign corporation must be on an agent representing the corporation with respect to such business. It must be made on an authorized agent of the particular corporation who is indeed truly a representative of it, not any employee. Crose v. Volkswagenwerk Aktiengesellschaft, supra.

Here, the facts were: a deputy sheriff served a union employee who was a line supervisor at Volvo Penta's plant in Virginia. This was not the corporate headquarters. The supervisor was the highest ranking employee at the plant at the time of service. However, his duties included only shipping of products, stocking of products and feeding the

production line. He at no time had been given any authority to represent Volvo Penta.

Kennedy relies on Johanson v. United Truck Lines, 62 Wn.2d 437, 383 P.2d 512 (1963), a factual circumstance similar to the one here. Johanson can be distinquished from this case on its facts. There, the line supervisor had authority to hire and fire personnel and had been served with process both before and after the questioned service. Here, the union line supervisor had only specific duties. He lacked the requisite authority to be served with process for Volvo Penta.

CR 60(b)(5) allows vacation of a void judgment. The service of process on Volvo was violative of RCW 4.28.080(10). Since the court had no jurisdiction over the defendant corporation, the judgment

is void.

This determination makes Volvo's other assignments of error of no consequence. The judgment is reversed.

This opinion will be filed for public record pursuant to RCW 2.06.040 as amended by the Laws of 1971, ch. 41, § 1, p. 63.

82-517

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ALEXANDER L. STEVAS,
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No. _____

In The Supreme Court
of the
United States

October Term, 1982

VOLVO PENTA OF AMERICA
Petitioner

vs.

PATRICK H. KENNEDY
Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Counsel for Respondent
Patrick H. Kennedy

LEAVY, SCHULTZ & SWEENEY, P.S.
JOHN G. SCHULTZ
117 South Third Street
Post Office Box 891
Pasco, Washington 99301

(509) 545-1434

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19 Am Jur 2d, Corporations Section 1463
62 Am Jur 2d, Process Section 28

STATUTES

R.C.W. 4.28.080

COUNTER STATEMENT OF THE CASE

On September 16, 1978, Patrick H. Kennedy purchased a 1979 28-foot Hawaiian boat. (CP 20-21). The retail dealer which formerly did business in Kennewick, Washington was Sundown Marine, Inc. The manufacturer of the boat which formerly did business was Hawaiian Boats, Inc., located in Huntington Beach, California. Volvo Penta of America, Chesapeake, Virginia, manufactured the engine. (CP 6-27).

The boat was defective upon delivery, and had significant engine problems. Mr. Kennedy rescinded his contract of purchase. (CP 6-27).

The only information provided with the product, concerning the location of the manufacturer of the engine was issued by "Volvo Penta" with the address as follows:

VOLVO PENTA OF AMERICA
Attn: Service Department
P.O. Box 1546
Chesapeake, Virginia 23320

(CP 6-27).

Contained with the boat was an instruction book for the "Volvo Penta" which was published in Sweden. No where in the documentation provided did it indicate that Volvo Penta of America is a division of another corporation, or that it had an office someplace else in the United States, other than Chesapeake, Virginia. (CP 6-27).

On May 25, 1979 , a formal notice of rescission was given to the three companies listed above by certified mail, return receipt requested. This notice stated that Mr. Kennedy had a claim for breach of warranty, and that he would bring an action if an out of court settlement could not be reached. (CP 6-27). This notice was mailed to Volvo Penta at its address in Chesapeake, Virginia. A signed return receipt was received showing that Volvo Penta received this letter on June 4, 1979. (CP 6-27). Volvo Penta did not respond to Mr. Kennedy's notice.

Mr. Kennedy instituted an action for breach of warranty under the Uniform Commercial Code in the State of Washington, and the Magnusson Moss Act (15 USC S2301 et seq). (CP 20-21). The sheriff of Chesapeake, Virginia, served a Summons and Complaint upon Volvo Penta of America at 4:oo p.m., on July 3, 1979. This was an ordinary working day, and the sheriff served Mr. Michael Machupa because he was the highest authority at the plant when the process was served. (CP 12). It is nowhere denied that Mr. Machupa was "in charge of his division and was the highest authority at the plant." (CP 6-27).

The sheriff indicated that before Mr. Machupa accepted service he made a long distance call to Volvo's New Jersey offices and that Mr. Machupa received express authority to accept the service. (CP 6-27). This fact is undenied and undisputed.

After entry of the default judgment, plaintiff's counsel, used exactly the same address, and mailed, first class mail, a letter dated September 17, 1979 enclosing a copy of the default judgment. Thereafter, Volvo moved to vacate the default judgment.

ARGUMENT

1. *Constitutional Sufficiency of Service:*
The State of Washington, like almost all other sister states, has enacted legislation that provides the method and manner of service of process upon a corporation. In 19 AmJur 2d *Corporations* S1462 the author states as follows:

> "While undoubtedly the State may prescribe special regulations governing service of process on corporations, it must, in fixing such regulations, act with due regard to the constitutional guaranty against deprivation of property without due process of law. The method prescribed for the service of process on a corporation, in order to confer jurisdiction, must constitute due process of law under the requirements of the Federal Constitution. If, however, the mode or method which has been provided does not deprive the corporation of its property without due process of law, the enactment is not subject to attack. The fundamental object of all laws relating to the service of process is to give that notice which will in the nature of things most likely bring the attention of the corporation to the commencement of the proceedings against it, and when the Legislature carries out this design, its provisions should not be stricken down by the courts."

The Legislature in the State of Washington has Passed a specific statute regulating the service of process upon foreign corporations doing business with sufficient minimum contacts for jurisdictional purposes in the State of Washington. In RCW 4.28.080 (10) the Legislature has provided in pertinent part as follows:

> "The Summons shall be served by delivering a copy thereof as follows:

...

(10) If the suit be against a foreign corporation...to *any agent*...thereof."

It is within the power of the state to determine what corporate officer or agent shall be served, provided that the constitutional guarantees of due process of law are observed. 19 AmJur 2d *Corporations* S1463. *Eureka Lake & Y Canal Co. vs. Superior Ct.*, 116 U.S. 410, 29 L.ed 671, 6 S.Ct. 429.

The tendency of legislative and judicial decisions has been to attempt to make it easier to obtain jurisdiction over foreign corporations. *International Shoe Company vs. Superior Court*, 22 Wn 2d 146, 171, 154 P2d 801 (1945). *See, also, Beach vs. Kerr Turbine Company*, 243 Fed. 706.

The courts have liberally construed the statutory term "any agent." *Faucher vs. Burlington Northern, Inc.* 24 Wn App.711, 603 P2d 844 (1979).

It is undisputed that there was no information with the product to indicate that Volvo Penta of America was a division of Volvo of America. After the suit was commenced, and service of process completed at the only address given to consumers, Volvo of America now claims that Volvo Penta of America is a "division" and that the consumer should have known that corporate offices were elsewhere. How? It is undisputed that the only information provided indicates that the company is located in Chesapeake, Virginia; that warranty complaints are to be addressed to Chesapeake, Virginia, and as far as any consumer would be aware the only other geographical location of Volvo Penta of America is in the Country of Sweden where the instruction book for the engine was printed.

The petitioner in this case takes the ludicrous position that service of process upon the highest corporate official at the only address for complaints, during ordinary business hours, is insufficient for in personam jurisdiction under the due process clause of the United States Constitution. The position of the petitioner simply has no merit.

The opinion of the prior cases in the State of Washington have been consistent since 1893 when interpreting the statute to provide that an individual such as Mr. Machupa who was in charge of his division would be a sufficient "agent" for service of process.

In *Gram vs. Idaho National Harvester Co.*, 105 Wn 602, 178 P 815 (1919) a similar challenge was made to service of process, and the Supreme Court affirmed that the process was valid. In *Grams* the Supreme Court described the duties of the individual upon whom service was had as follows:

> "M.C. Priddy testified that, on the day the summons was served on him, he was in Adams County for the purpose of checking and handling a stock of extras or repair parts of the machine on hand with the union elevator and warehouse company at Ralston, having been sent by the manager of appellant to do this particular work. He held no official position with appellant. He worked by the month for a salary and had no regular kind or class of work, but did different work and performed different duties as the manager of appellant instructed, assigned, or directed him to do."

The State (RCW 4.28.080, et seq.) has remained unchanged in any material part, since 1893. The Supreme Court in *Grams* stated as follows:

> "We think that there can be no question that M.C. Priddy at the time of the service of the Summons and Complaint upon him, was 'an agent' of the appellant, within the contemplation of the statute. For some time he had been, and was still, employed to do whatever he was directed to do by the General Manager of the Company; at the time in question, under instructions of the company, he was in Adams County to check up and take over all of the property of the appellant remaining in the hands of Union Elevator and

Warehouse Company. While there, he rendered that service, and gave the merchant a receipt for the goods, took the goods and shipped them to his principal, the appellant. This court in the case of *Barrett Manufacturing Co., vs. Kennedy*, 73 Wn 503, 131, P 1161, after enumerating a number of cases from this and other courts upon this subject, further refers to some of them and concludes as follows:

"In the *Jenkins* case (73 S.C. 526, 53 S.E. 991), a service of Summons upon a time keeper of the defendant, a foreign corporation was held sufficient. The court said that the legality of the service did not depend upon the tenure of the service, but 'upon the character or nature of the service,' and that 'agency may also be shown by the fact that a person represents the master in some, one or more of his relations to others, even though he may not have the power to contract.' The statute makes service upon 'any agent' of a foreign corporation sufficient. The statute therefore, does not require that the agent shall be general, but is complied with by a service upon an agent having limited authority to represent his principal.' In the *Cottrell* case (83 B.A. 512, 3 S.E. 123), the court defined the term 'agent' as signifying 'anyone who undertakes to transact some business affair for another by authority and on account of the latter, and to render an account of it.'

> In the *Moinet* case (143 Mich. 489, 106 NW 1126) it was held that at traveling salesman of a domestic merchantile company is an agent within the meaning of the statute permitting service 'upon the agent' of a corporation. The words of the statute 'any agent' were intended to have a broad meaning, and must be liberally construed to effectuate the legislative intent. While they may not include a day laborer or an employee who has no authority to represent the corporation in any way other than to discharge his daily task, they must be held to include all such agents as represent the corporation in either a general or a limited capacity."

The respondent would suggest that an unknowing consumer certainly should be permitted within the confines of the existing law to commence an action by serving an individual that is in charge of a division of a corporation, particularly since service of process was not attempted on a night watchman, or when the company was not actually doing business, but service was made on the highest individual in charge at the only address given for complaints, during ordinary business hours.

In *Brace vs. Northern Pacific Railroad Co.*, 63 Wash. 417, 115 P 841 (1911) the court stated as follows:

> "Corporations necessarily act through authorized agents. Departments are created in charge of superintendents, with many subordinates through whom the corporation conducts its business and deals with the public. The more extensive the greater number of agents.

> If each and every individual having business with such corporation must at his peril ascertain and determine that exact scope and limitation of the agent's authority, it is manifest that he could not deal with the acknowledged agent and that the business of the corporation itself would be materially impaired."

It is also undisputed and undenied, that Mr. Machupa had express authority from headquarters located elsewhere that he should accept service of the process.

EVIDENTIARY SUPPORT

It is, of course, a broad fundamental principle that the courts presume that public officers such as Sheriffs faithfully discharge their sworn duties. It is not necessary pursuant to the Statutes of the State of Washington that the Sheriff's Return of Service be by affidavit. The Sheriff may serve the documents, and so certify by a "return" or endorse or attach the same to the summons. RCW 4.28.310 provides as follows:

> "Proof of service shall be as follows:
> (1) If served by the sheriff or his deputy, the return of such sheriff or his deputy endorsed upon or attached to the summons. If by any other person, his affidavit there of endorsed upon or attached to the summons;"

It is well established that a sheriff's return is conclusive as to matters within the knowledge of the sheriff. *Krutz vs. Isaacs,* 25 Wn 566, 66 P. 141 (1901). It is the fact of service that confers jurisdiction on the court, and not the return of service. A return of service may be later amended to speak the truth. *Williams vs. Steamship Mutual Underwriting Assn. Ltd.,* 45 Wn 2d 209, 273 P2d 803 (1954).

In this case the sheriff's return was amended by letter (which need not be notarized by statute) and was accepted by the courts of the State of Washington.

There never has been any accusation that the information provided by the sheriff was false, or that the sheriff did not do exactly as he indicated that he did, and as he was required to do by law. In 62 AmJur 2d, *Process* S28 the author states as follows:

> "It is a broad fundamental principle that a presumption will be indulged in favor of the legality and regularity of the proceedings of the trial court when this may be done consistently with the record; it will be presumed, if the court is a court of general jurisdiction, that it regularly acquired and lawfully exercised its jurisdiction over the party or the res, as the case may be. This is true not only in the reviewing court on appeal or error proceeding, but whenever a judicial proceedings or a judgment or decree rendered therein becomes a factor in the trial of another case. There is a presumption that public officers discharge the duties of their office and in the discharge of such duties observe the necessary and proper formalities imposed by the law upon them, and faithfully perform those matters with which they are charged. (Italics Supplied.)"

The defendants have never denied a single syllable of information supplied by the sheriff who served the papers; in fact, a close reading of the affidavits that were supplied when compared with the information provided by the sheriff, provides undisputed and undenied evidence that compels the conclusion reached by the courts in the State of Washington, i.e., that service was at a proper place, at a proper time, and upon a proper party.

CONCLUSIONS

1. The courts of the State of Washington have reached the only conclusion that can be reached under the facts of this case; that service of process was had upon the individual in charge of a division of a manufacturing company; that service of process was made by a public official at the only address provided for unknowing customers; that service of process was had during regular business hours; that it must be held as a matter of law that such service of process is adequate.
2. That the Sheriff properly fulfilled the sworn duties of his office, and his report to the court through counsel was appropriate.
3. That the court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

LEAVY, SCHULTZ & SWEENEY, P.S.
JOHN G. SCHULTZ
Counsel for the Respondent,
Patrick H. Kennedy